

Hamdan (Migration) [2019] AATA 2406 (8 May 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Abdul Salam Hamdan

CASE NUMBER: 1718034

HOME AFFAIRS REFERENCE(S): BCC2015/3237442

MEMBER: Helena Claringbold

DATE: 8 May 2019

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820. 211(2)(a) of Schedule 2 to the Regulations; and
- cl.820.221(1)(a) of Schedule 2 to the Regulations.

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Statement made on 08 May 2019 at 2:42pm

1. CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – genuine spousal partners – parties share expenses and pool financial resources – share housework and child care – recognised as married couple – mutual commitment to shared life to exclusion of others – genuine and continuing relationship – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), s 5F

Migration Regulations 1994 (Cth), r 1.15A, Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

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STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. On 4 November 2015, Mr Abdul Salam Hamdan, the applicant, applied for a Partner (Temporary) (Class UK) visa. The application was based on his spousal relationship with Ms Marua Hamdan, the sponsor.
3. On 26 July 2017, a delegate of the Minister for Immigration and Border Protection refused to grant the visa. The delegate was not satisfied that the applicant and the sponsor are genuine spousal partners. Therefore, the applicant did not meet cl.820.211(2)(a) of Schedule 2 to the Migration Regulations 1994 (the Regulations) made under the *Migration Act 1958* (the Act). On 15 August 2017, the applicant provided the Tribunal with a copy of the delegate's decision record. This is a review of the delegate's decision.
4. On 8 May 2019, the applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic (Lebanese) and English languages. The applicant was represented in relation to the review by his registered migration agent.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The Tribunal has taken into consideration, individually and as a whole, the evidence in the Department of Immigration and Border Protection's (the Department's) case file and the Tribunal's case file and the evidence at the Tribunal hearing.

ISSUE

7. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5F of the Act.

BACKGROUND ON THE EVIDENCE

8. The applicant was born in 1988 in Harf Syad, Lebanon. His father is deceased. His mother and two sisters live in Lebanon, while his remaining two brothers live in Australia and Saudi Arabia. On 25 October 2011, the applicant entered Australia as the holder of a student visa. In December 2012, he was granted an additional student visa.
9. On 6 July 2013, he married Ms Jenan El Rishe. In August 2013, Ms El Rishe and the applicant separated. On 24 October 2015, the applicant and Ms El Rishe divorced. There are no children from this relationship.
10. The sponsor was born in 1993, in New South Wales, Australia. She is an Australian citizen. Her parents, two brothers and two sisters live in Australia.
11. In December 2013, the parties met at a New Year's Eve party with the parties' extended family in Cabarita Park, Cabarita, New South Wales, Australia. On 25 October 2015, the parties married in Lidcombe, New South Wales, Australia. There is one child from the relationship who was born in June 2017.

Whether the parties are in a spouse or de facto relationship

12. Is the applicant the spouse of an eligible resident?

13. The Tribunal is satisfied that the sponsor, at the time of visa application and at the time of decision, was and is an Australian citizen.

14. Are the parties validly married?

15. At the time the visa application was made, the applicant provided evidence of his marriage to the sponsor. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the parties are in a spouse or de facto relationship?

16. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a) - (d).

Are the other requirements for a spouse relationship met?

17. In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsors household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.
18. Regarding the parties' financial matters, the parties do not have any joint ownership of assets or joint liabilities or any financial or legal obligations to each other. The applicant started his own business two years ago. Prior to the sponsor stopping work she contributed to the parties' household. The parties' income is derived from the applicant's salary. The parties' bank account is used to manage their financial matters including paying the rent and motor car loan repayments. The applicant provided an assortment of financial documents related to the parties' financial matters including copies of credit card statements, receipts for household purchases and car and insurance documents. The parties provided the Tribunal with consistent information about their financial matters. The Tribunal accepts that the parties share some day-to-day household expenses and pool their financial resources.
19. Regarding the nature of the parties' household, the parties have lived at one residential address in Guildford, New South Wales. Their accommodation is a flat which is rented from the applicant's brother. The sponsor manages the household including taking care of the parties' son. However the applicant assists where possible. The Tribunal accepts that the parties share joint responsibility for the care and support of their child and that they share housework.
20. Regarding the social aspects of the parties' relationship, the parties describe themselves as being family orientated and a lot of activities involve their family. They enjoy going to a park or the beach on Sundays and fortnightly visit their alternate families. Their wedding was attended by family members and friends. Third-party statements attest to the genuine nature of the parties' relationship. Statements from family members record their support and agreement with the parties' marriage. Photographic evidence depicts the parties together

and with others at different locations. The Tribunal accepts that the parties present themselves and are recognised by others as being in a spousal relationship. The Tribunal accepts that the parties undertake joint social activities.

21. Regarding the parties' commitment to their relationship, the parties met in December 2013. In October 2015, the parties legally married. The parties began preparing for cohabitation by buying furniture and household items. On 8 January 2016, they held their wedding party and commenced living together. They have lived together in a spousal relationship since then. In June 2017, the sponsor gave birth to the parties' first child. DNA evidence provided by the applicant demonstrates that the applicant and the sponsor are the child's biological parents. The applicant would like to have an 'army of children' however the sponsor will settle for about three children. The applicant is saving for the purchase of a residential property where the parties will live. They provided consistent evidence about their past and current circumstances and about their hopes and plans for the future. The Tribunal accepts that the parties provide each other with emotional support and see their relationship as long term.
22. The Tribunal considered the evidence individually and as a whole. The parties provided consistent evidence to the Tribunal about all aspects of their relationship. The Tribunal is satisfied of the following: that the parties pool financial resources and share the responsibility of caring for their child and the housework. The parties plan and undertake social activities together and represent themselves to other people as being married to each other and are recognised as a married couple. The parties provide each other with companionship and support and see their relationship as long term. They demonstrated a sound knowledge of each other's lives which is commensurate with a couple in a genuine and ongoing spousal relationship. The Tribunal accepts that the parties have a mutual commitment to a shared life as spousal partners to the exclusion of all others and that their relationship is genuine and continuing and that they do not live separately and apart on a permanent basis.
23. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
24. Therefore the applicant meets cl.820.211(2)(a) and cl.820.221(1)(a) of Schedule 2 to the Regulations.
25. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

26. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 -
 - cl.820. 211(2)(a) of Schedule 2 to the Regulations; and
 - cl.820.221(1)(a) of Schedule 2 to the Regulations.

Helena Claringbold
Member

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ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).